

2003 WL 25746167 (Miss.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Mississippi.
Grenada County

The Estate of Vader I. PERRY by and through Betty Rayburn, Administratrix of the Estate of Vader I. Perry, for the use and benefit of the Estate of Vader I. Perry, and for the use and benefit of the wrongful death beneficiaries of Vader I. Perry, Plaintiff,

v.

MARINER HEALTH CARE, INC. f/k/a Mariner Post-Acute Network, Inc.; National Heritage Realty, Inc.; Grancare, Inc.; Evergreen Healthcare, Inc.; John Does 1 through 10; and Unidentified Entities 1 through 10 (as to Grenada Health & Rehabilitation Center), Defendants.

No. 2001-0485CVL.
December 8, 2003.

Plaintiff's Response to Defendants' Motion in Limine Regarding Various Matters

Respectfully submitted, The Estate of Vader I. Perry by and through Betty Rayburn, Administratrix of the Estate of Vader I. Perry, for the use and benefit of the Estate of Vader I. Perry, and for the use and benefit of the wrongful death beneficiaries of Vader I. Perry, Wilkes & McHugh, P.A., [Richard E. Circeo](#), Esq., Mississippi Bar No. 9949, [Christine C. Althoff](#), Mississippi Bar No. 101077, W. Todd Ver Weire, Mississippi Bar No. 101021, Brian Thompson, Mississippi Bar No. 101102, 16 Office Park Drive, Ste. 8, Hattiesburg, MS 39402, Mailing Address: P. O. Box 17107, Hattiesburg, MS 39404, Telephone: 601-545-7363, Facsimile: 601-545-7364, Attorney for Plaintiff.

INTRODUCTION

Defendants have filed what amounts to 42 motions in limine, which, if granted, would preclude Plaintiff from introducing any evidence whatsoever at trial. The Motion in Limine should be recognized for what it is: a subterfuge by Defendants to escape the consequences of their wrongdoing and to deprive the Perry family of their fair day in Court. Defendants' Motion is premised on the notion that Plaintiff should not be allowed to introduce any testimony or evidence about any aspect of Mrs. Perry's neglect and injuries caused by Grenada Health & Rehabilitation. Defendants insinuate that Mrs. Perry existed in a vacuum, separate and apart from the nursing facility that was her world and her home. As set forth below, the areas of testimony and evidence that Defendants seek to prohibit are relevant and necessary to Plaintiff's case.

Defendants' motion attempts to tell Plaintiffs counsel how to try this case, what witnesses should be called by Plaintiff and what the important issues will be for Plaintiff in this case. However, Plaintiff has a very different view of what this case is about. In her Complaint, Plaintiff has alleged negligence, medical malpractice, gross negligence and malice, statutory survival, and wrongful death. In addition, Plaintiff is seeking punitive damages. Plaintiff alleges that Defendants were fully aware of the dangerous conditions present at Grenada Health & Rehabilitation, as well as the deteriorating condition of Vader Perry. In fact, as explained below, the evidence Defendants want excluded describes pervasive and continual custodial neglect of Mrs. Perry as well as Defendants' conscious indifference to the conditions causing her injuries.

Alternatively, a ruling on many of the issues presented by Defendants is premature until specific testimony is offered at trial. Plaintiff's counsel fully intends to lay a proper foundation for all evidence and testimony presented and has no intention of introducing any evidence prohibited by the Mississippi Rules of Evidence.

1. INCIDENTS AND DOCUMENTS INVOLVING OTHER RESIDENTS

Plaintiff does not intend to introduce, and in fact does not have possession of any privileged information related to residents other than Vader Perry. However, certain similar incidents involving other residents, whether such incidents are introduced through testimony, surveys, reports, or other means, are relevant for the reasons set forth below.

The testimony Defendants seek to exclude is relevant and probative as it provides a causal link between Defendants' acts and the injuries suffered by Mrs. Perry. Plaintiff should be allowed to show that the substandard care received by Mrs. Perry was not an isolated incident. Evidence of other similar incidents as well as the environment of care provided at Grenada Health & Rehabilitation is admissible to show Defendants knew or should have known of the deplorable conditions existing in the facility, yet they did nothing. This evidence is also relevant to Plaintiff's claim for punitive damages.

The existence of prior similar incidents is clearly probative of Defendants' liability, and certain testimony from Defendants' employees is relevant to show Defendants knew or should have known of the problems in their facility. This testimony is admissible under [Rule 406 of the Mississippi Rules of Evidence](#), which provides that evidence of the routine practice of an organization is relevant to prove that the conduct of that organization on a particular occasion was in conformity with its routine practice. See, e.g., *Jenkins v. CST Timber Co.*, 761 So. 2d 177 (Miss. 2000) (holding that the trial court erred in refusing to allow testimony that defendants had a routine practice of bad faith dealings with other persons); *Hans Construction Company, Inc. v. Drummond*, 653 So. 2d 253 (Miss. 1995) (allowing evidence that defendant had a routine practice of bad faith dealings with other companies). Defendants' routine practice of allowing Grenada Health & Rehabilitation to continue to provide substandard care despite knowledge of the harm being caused can be proven by testimony or by specific instances of conduct sufficient in number to warrant a finding that the practice was, in fact, routine.

In *State of Missouri v. Boone Retirement Center, Inc.*, 26 S.W.3d 265 (W.D. Mo. 2000), the court upheld convictions of a nursing home and its administrator on charges of neglect of a nursing home resident. In *Boone*, a hotline investigation conducted by the Missouri Division of Aging resulted in the issuance of numerous state and federal regulatory citations for issues such as prevention and quality of care for [pressure sores](#), nutrition and nursing care. Two of the facility's residents died in September of 1995 with complications from [bedsores](#) contributing to their deaths. The state later filed 8 counts of neglect and 34 counts of false representation to receive a Medicaid payment against each defendant. In upholding the convictions, the court considered the following evidence:

- a. The facility was frequently understaffed and, as a result, patients were not turned consistently on a two-hour basis;
- b. There was a problem with residents not receiving snacks that would have bolstered their nutritional status and aided [bedsore](#) healing;
- c. The nursing home had an increasing rise in both the incidents and severity of [bedsores](#); and
- d. Charting of care was frequently incomplete.

Id.

The court further held that there was sufficient evidence that defendants knew of the dangers potentially presented by [bedsores](#) and that they "well understood" the potential danger to at-risk patients from inadequate staffing, nutrition, turning, pressure relieving devices, and other treatments. *Id.*

The *Boone* court admitted evidence of conditions throughout the facility although the specific crimes alleged were against particular residents. This was true even though criminal sanctions would potentially be imposed. If a criminal jury can consider such evidence in determining whether to convict individuals of felony crimes, certainly a civil jury can do the same. In this

case, Plaintiff should be allowed to present evidence that Defendants knew of the conditions existing on the premises prior to and during the time of Mrs. Mason's residency. *See, e.g., Montgomery Health Facility, Inc. v. Ballard*, 565 So.2d 221 (Ala. 1990) (affirming jury verdict for punitive damages because facility was so grossly negligent in maintaining its facility-wide paperwork, failing to address the documented patterns of neglect and otherwise not caring for its **elderly** residents).

Similarly, in *Mitchell v. State*, 491 So.2d 596 (Fla. 1st Dist. Ct. App. 1986), the appellate court held that evidence relating to the general conditions of a nursing home facility including roach infestation, the failure to follow dietary menus and nutritional guides, inadequate staffing and training, and references to poor care of *other residents at the facility* was admissible.

We are of the view that the evidence in the category was admissible to show knowledge and absence of mistake on the part of Mitchell. The defense pointed to testimony that **bedsores** can occasionally develop in a properly supervised facility. Evidence of the prevalence of the conditions and improper treatment throughout the [facility] was relevant to counter an inference that the conditions giving rise to the named victim's injuries were isolated instances beyond the defendant's knowledge and control.

Id. at 599.

In *State of Wisconsin v. Serebin*, 350 N.W.2d 65 (Wis. 1984), the Wisconsin Supreme Court upheld the conviction of a nursing home administrator for **abuse** and neglect of twelve of the nursing home residents. Expert medical testimony determined that the understaffing of the facility had a direct connection to the residents' weight loss as well as the development and worsening of the residents' **bedsores**. *Id.* at 855-56. Evidence also indicated that the **abuse** and neglect occurred because there were not enough nurses and aides to ensure that residents were eating all of their meals and being turned and repositioned every two hours. *Id.*

In *Boone, Mitchell* and *Serebin*, the courts admitted evidence of conditions throughout the facilities in question when the specific crimes alleged were against particular residents. This was true even though criminal sanctions would potentially be imposed. Plaintiff here is seeking a lesser punishment, that of punitive damages. If a criminal jury can consider such evidence in determining whether to convict individuals of felony crimes, certainly a civil jury can do the same.

Further, in *Dawkins v. Redd Pest Control Co., Inc.*, 607 So.2d 1232 (Miss. 1992), the Mississippi Supreme Court held that previous occurrences can be used to establish intentional wrongs or gross negligence. *Id.*, citing *Mutual Life Ins. Co. of New York v. Wesson*, 517 So.2d 521 (Miss. 1987). There, the plaintiff had purchased a house in which the defendant pest control company performed a pre-sale termite inspection. The defendant's service technician certified that there was no visible evidence of termite infestation, however, after the sale the plaintiff discovered extensive termite damage. One of the plaintiffs interrogatories requested the names, addresses, and phone numbers of other customers whose pre-sale inspections were conducted by the same technician. The Court held that evidence of similar occurrences can be used to show that the occurrence in question was so typical of the defendant's operations as to raise an inference of intentional wrongdoing. *Id.*, citing *Universal Life Ins., Co. v. Veasley*, 610 So.2d 290 (Miss. 1992). Further, erroneous denial of this type of discovery is ordinarily prejudicial in the absence of circumstances showing it is harmless. *Id.*, citing *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir. 1980).

Defendants clearly want to exclude evidence that proves they consciously continued a harmful course of conduct in spite of the known consequences to defeat Plaintiff's claim for punitive damages. In *Gunthorpe v. Daniels*, 257 S.E.2d 199 (Ga. 1979), the court explained in detail the admissibility of such evidence at trial as extremely relevant to a punitive damages claim:

The existence of a claim for punitive damages is an added factor. To authorize recovery of additional damages under Code Ann. section 105-2002 "there must be evidence of willful misconduct, malice fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." [citation omitted]. On this issue, pleadings and evidence to the effect that the defendant knew from previous experience that the alleged negligence on his part would probably result in injury to the plaintiff, because he knew that such carelessness on his part had resulted in similar injuries to others but continued in this course of conduct in utter indifference to the consequences, are admissible on the question of malice or wanton misconduct...

Id. at 201. *See also*, [Jack Eckerd Corp. v. Smith](#), 558 So.2d 1060 (Fla. 1st Dist. Ct. App. 1990) (finding defendant's knowledge of risk clearly relevant to show a conscious or reckless indifference related to a punitive damages claim.)

Defendants' Motion is an attempt to exclude evidence because it is harmful to their case. This evidence is directly relevant to Plaintiffs claims. Accordingly, Plaintiff respectfully requests the Court to deny Defendants' Motion or, alternatively, withhold ruling on this issue until the appropriate time at trial.

Moreover, the evidence Defendants seek to exclude in this case is not remote in time, nor is it intended to establish motive or discredit Defendants. Such testimony is circumstantial evidence of Defendants' notice and/or knowledge of the dangerous conditions existing at Grenada Health & Rehabilitation. The existence of prior similar incidents is clearly probative of Defendants' liability, and the testimony from Defendants' employees is relevant to show Defendants knew or should have known of the problems in their facility. Accordingly, testimony from any witness that evidences similar problems with the care and treatment of Mrs. Perry, as well as other residents, is admissible to prove Defendants had notice of existing problems within their facility and, therefore, is probative of their liability in this case.

2. OTHER UNRELATED INCIDENTS REGARDING GRENADA HEALTH & REHABILITATION OR OTHER DEFENDANT OWNED FACILITIES

Other similar incidents that occurred at the facility during the relevant time period are directly related to this case as explained above. In addition, Defendants appear to seek in this Motion to prohibit any mention of their organization and the fact that they had operated a chain of nursing homes for many years and should have known better for their negligent operation of Grenada Health & Rehabilitation.

Testimony regarding the corporate structure that may incorporate other nursing home facilities owned and/or operated by the same Defendants is relevant both to explain to the jury the actual organizational set up of this company and to show the knowledge and degree of skill Defendants should have had in terms of their ability to provide residents with adequate care.

Defendants also argue that the relevance of the fact that they own other nursing homes is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. However, it is unclear how the fact that Defendants operate more than one nursing home could confuse or mislead the jury. The issue is basic. One of the contentions in this case is that Defendants' corporate philosophy and method of doing business caused injury to Mrs. Perry. There is no unfair prejudice in presenting evidence to the jury explaining the corporate structure of the Defendants especially when it directly affected the operation of Grenada Health & Rehabilitation. Plaintiff alleges that the corporate structure of Defendants was designed to maximize profit without consideration of residents' needs and as a result, residents such as Vader Perry did not get the care they required.

Evidence related to this allegation is also relevant because it explains Defendants' motive and the knowledge of Defendants of the prevalence of the conditions at their homes. Plaintiff contends that these conditions arose out of corporate policies instituted by Defendants: policies that put profits over people. Vader Perry was injured because of these policies, and the jury is entitled to know the nature of these policies; the structure and identity of the corporations behind the policies; and the corporations' knowledge of the effect of such policies.

Additionally, Plaintiff is entitled to introduce evidence related to Defendants, their policies and structure under [Rule 406 of the Mississippi Rules of Evidence](#). This rule states that evidence of the routine practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with its routine practices. *See Miss. R. Evid. 406*. The rule goes on to explain that an organization's routine practice may be proved by specific instances of conduct sufficient

in number to warrant a finding that the practice was routine. See [Miss. R. Evid. 406](#). Plaintiff should be allowed to introduce evidence regarding routine practices of Defendants that resulted in injuries to Vader Perry.

Also, the fact that these Defendants were operating their nursing homes along a common design or scheme is relevant to the notice they had of problems and their culpability for disregarding what they knew were obvious problems. In fact, these Defendants often brought in personnel from their other Mississippi nursing homes to provide training and damage control to the staff of Grenada Health & Rehabilitation. Such information is relevant to this case. Therefore, for the reasons set forth in above, Defendants' Motion as to this point should be denied.

3. LIABILITY OF LEE, GOODE OR OTHER EMPLOYEES/AGENTS OF DEFENDANTS

Plaintiff has not intention of seeking an apportionment of fault to parties not presently before this court, including Mr. Lee or Ms. Goode or any other employee or agent of Defendants as evidenced by the motion for partial summary judgment which Plaintiff filed in this matter. However, this does not mean that Plaintiff does not seek to hold Defendants liable for the negligent actions of its employees or agents which harmed Vader Perry.

4. RULINGS MADE REGARDING LEE OR GOODE

Plaintiff is at a loss regarding what Defendants seek regarding this motion in limine. Plaintiff is cognizant of the rulings this court made regarding the issue of individual liability for these individuals and has to work within the bounds of those rulings, that does not mean that Plaintiff is prohibited from referencing or using any arguments made in relation to those rulings should the situation arise and such arguments/information becomes relevant.

5. REFERENCE OR MENTION OF A CLAIM FOR FRAUD

While Plaintiff no longer has fraud count pending in this case, that does not mean that evidence which relates to both negligence and fraud is inadmissible. For instance, Plaintiff anticipates presenting evidence wherein Defendants through their employees charted Mrs. Perry as receiving care when she was not at the facility along with care givers charting as giving care when there were not working. While such evidence can be characterized as fraudulent, it is also evidence of breaching the standard of care with regards to negligence and potential evidence of gross negligence.

6. REFERENCE TO THE NATURE OR EXTENT OF ANY LEGAL DUTY

Defendants attempt to prevent Plaintiff from presenting any evidence, through either expert testimony or otherwise, of any duty Defendants owed Vader Perry. Plaintiff has the burden of demonstrating that Defendants owed a duty and that they breached that duty. Towards that end, Plaintiff will rely upon the opinions of experts and various state and federal regulations regarding the appropriate standard of care. Plaintiff has fully addressed this issue of using State and Federal Regulations as a basis for the duty Defendants owed Vader Perry in her *Response to Defendants' Motion in Limine Regarding State and Federal Regulations* and incorporates that response herein.

Plaintiff also intends to use expert opinions in establishing the requisite standard of care (duty) Defendants owed Vader Perry. Plaintiff recognizes the requirement that an appropriate predicate must be laid before any such questions may be asked. However, often such opinion testimony *is* proper and, especially when applied to the facts of this case, admissible. The Court, during the trial of this matter, will be able to determine whether Plaintiff has laid the appropriate foundation for the presentation of expert testimony. Defendants' motion is overly broad and premature and therefore, should be denied.

Further, under [Mississippi Rule of Evidence 702](#), testimony by an expert witness who is qualified by knowledge, skill, experience, training or education, is admissible to assist the trier of fact in understanding the evidence or determining a fact in issue. In fact, if any reasonable basis exists demonstrating that a witness has knowledge of a subject beyond that of ordinary knowledge, the witness' evidence is admissible as expert testimony. Many of Plaintiff's trial witnesses, including those named as expert witnesses, have specialized skills and knowledge that will allow them to assist the jury in its determination of relevant facts presented in this case.

Accordingly, [Rule 701 of the Mississippi Rules of Evidence](#) permits lay witnesses to testify in the form of an opinion:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness; and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

[Miss. R. Evid. 701.](#)

Rule 704 permits a witness to give his opinion on the ultimate issue to be determined:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

[Miss. R. Evid. 704.](#)

Therefore, Defendants' Motion as to this point is without merit and should be denied.

7. ASKING JURORS TO PUT THEMSELVES IN VADER PERRY'S POSITION

Plaintiff is well aware of the restrictions that exist regarding voir dire and counsel's arguments and towards that end will act appropriately. Defendants' attempt to stretch the relevant rules regarding conduct in these situations should be seen for what it is, an unsupported attempt to dehumanize Vader Perry and try this case in a vacuum.

8. REDUCTION OF AWARD BY THE TRIAL COURT OR BANKRUPTCY COURT

Plaintiff is unsure as to what Defendants' seek through this motion. Plaintiff has no intention of mentioning the bankruptcy, as evidenced by the recent motion in limine that she filed regarding this matter. Further, any post-trial attempts to remit/reduce any verdict will be vigorously opposed. Lastly, Plaintiff does not agree that any state based statutory mechanism which allows for the reduction of a jury verdict is applicable in this action, such as the recently passed tort reform legislation concerning caps on punitive damages.

9. COMMITMENT OF JURY DURING VOIR DIRE

Plaintiff is well aware of the restrictions imposed concerning obtaining commitments from jurors during the voir dire process and does not intend to violate those rules.

10. DEFENDANTS' FAILURE TO COMPLY WITH DISCOVERY ORDERS

Plaintiff currently has a motion pending regarding spoliation and sanctions for Defendants' failure to comply with orders of this court regarding discovery. As such, Defendant's motion is premature at best. Should this court grant Plaintiffs motion

regarding sanctions, Plaintiff fully intends to utilize the remedies afforded her by the trial court. As such, Defendants' motion should be denied.

11. REFERENCE TO MOTIONS IN LIMINE

Plaintiff agrees that referencing the fact that either party filed motions in limine should be restricted. However, Plaintiff reserves the right to reference any pre-trial ruling regarding the admissibility of evidence should the need arise.

12. SPOILIATION/FALSIFICATION OF DOCUMENTS

As mentioned above in section 10, *supra*, Plaintiff has a motion for sanctions pending. Plaintiff will utilize any remedial action provided should it become necessary. Regarding the falsification of information contained within Vader Perry's chart, Plaintiff intends to lay the necessary predicate to demonstrate the falsity of the information. Requiring Plaintiff to lay the necessary predicate for the admission of such evidence outside the jury's presence is neither appropriate nor practical as the jury will need to hear the steps leading up to why certain information contained with Mrs. Perry's medical chart is false. For instance, there are occasions when Mrs. Perry's chart reflects care being provided while she was not at Grenada Health & Rehabilitation. To demonstrate the inaccuracy of the information in the chart, the jury must be exposed to the fact that Mrs. Perry was in fact not at the facility on the date in question and yet employees were charting care as being provided. While Defendants may like to dictate how Plaintiff will try her case and present evidence, such conduct is not permissible.

13. OTHER FACILITY INFORMATION

Defendants appear to seek in this Motion to prohibit any mention of their organization and the fact that they operate a chain of nursing homes and should know better for their negligent operation of Grenada Health & Rehabilitation. Testimony regarding the corporate structure, which may incorporate other nursing home facilities owned and/or operated by the same Defendants, is relevant both to explain to the jury the actual organizational set up of this company and to show the knowledge and degree of skill Defendants should have had in terms of their ability to provide residents with adequate care.

Defendants also argue that the relevance of the fact that they own other nursing homes is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. However, it is unclear how the fact that Defendants operate more than one nursing home could confuse or mislead the jury. The issue is basic. One of the contentions in this case is that Defendants' corporate philosophy and method of doing business caused injury to Mrs. Perry. There is no unfair prejudice in presenting evidence to the jury explaining the corporate structure of the Defendants especially when it directly affected the operation of Grenada Health & Rehabilitation. Plaintiff alleges that the corporate structure of Defendants was designed to maximize profit without consideration of residents' needs and as a result, Vader Perry did not get the care she required.

Evidence related to this allegation is also relevant because it explains Defendants' motive and the knowledge of Defendants of the prevalence of the conditions at their homes. Plaintiff contends that these conditions arose out of corporate policies instituted by Defendants: policies that put profits over people. Vader Perry was injured because of these policies, and the jury is entitled to know the nature of these policies; the structure and identity of the corporations behind the policies; and the corporations' knowledge of the effect of such policies.

Additionally, Plaintiff is entitled to introduce evidence related to Defendants, their policies and structure under [Rule 406 of the Mississippi Rules of Evidence](#). This rule states that evidence of the routine practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with its routine practices. See [Miss. R. Evid. 406](#). The rule goes on to explain that an organization's routine practice may be proved by specific instances of conduct sufficient in number to warrant a finding that the practice was routine. See [Miss. R. Evid. 406](#). Plaintiff should be allowed to introduce evidence regarding routine practices of Defendants that resulted in injuries to Vader Perry.

Also, the fact that these Defendants were operating their nursing homes along a common design or scheme is relevant to the notice they had of problems and their culpability for disregarding what they knew were obvious problems. In fact, these Defendants often brought in personnel from their other Mississippi nursing homes to provide training and damage control to the staff of Grenada Health & Rehabilitation. Such information is relevant to this case. Therefore, for the reasons set forth herein and in section 2 above, Defendants' Motion as to this point should be denied.

14. LOCATION OF DEFENDANTS' HOME CORPORATE OFFICES

The jurors have a right to put a face on both Plaintiff, Vader Perry and Defendants. Towards that end, knowing where Defendants' corporate offices are located is proper. Furthermore, because one of Plaintiffs theories is that Defendants put profits over people, it is proper to reference the fact that individuals in Defendants' corporate headquarters located in another state were responsible for making decisions regarding the care and treatment Vader Perry and other residents of Grenada Health & Rehabilitation received. Therefore, Defendants' motion should be denied.

15. STATE SURVEYS OR INVESTIGATIONS THAT DO NOT REFERENCE VADER PERRY

Defendants have asked this Court to exclude any reference to state surveys of their facilities. For the reasons set forth herein, Defendants' motion is without merit and should be denied. State surveys of nursing facilities were implemented due to serious concerns about the well-being of nursing home residents. The Nursing Home Reform Act of 1987 established a national policy as well as industry standards for **elderly** residents in nursing homes funded by Medicare and/or Medicaid. *See* 42 U.S.C. § 1396r. The standards of care and specific regulatory requirements of the Defendants' facilities are codified at 42 C.F.R. Part 483 (Requirements for States and Long-Term Care Facilities). The United States Department of Health and Human Services, through its agency, Center for Medicare and Medicaid Services (CMS), in turn mandates that each state license its facilities and implement the standards set forth in the Act.

State survey agencies, using qualified health care professionals, conduct annual surveys of every Medicare or Medicaid certified nursing home to ensure residents receive the mandated care in a clean, safe environment and that they are treated with dignity and respect. Such survey agencies have the power to enforce federal guidelines and sanction non-complying facilities. Nursing homes that do not provide the services required by state and federal agencies are cited for deficient practices and may be fined or even terminated from receiving payments from Medicare or Medicaid. In Mississippi, the Mississippi State Department of Health is charged with enforcing state and federal standards.

Following the survey process, the Department of Health may issue a Statement of Deficiencies reporting specific aspects of the nursing home's activities that do not meet federal and state standards. Next, the facility must file a Plan of Correction, which sets forth the corrective actions to be implemented. The Department of Health will subsequently conduct another survey to ensure that the corrective measures have been implemented. Clearly, the survey process is crucial to the very existence of nursing homes and provides direct evidence of the care provided by each facility.

According to a report dated May 7, 2003, the vast majority of nursing homes in the Second Congressional District of Mississippi, which includes the county in which Greenwood Health & Rehabilitation is located, failed to meet federal standards governing quality of care. *See Nursing Home Conditions in the Second Congressional District of Mississippi: Many Homes Fail to Meet Federal Standards for Adequate Care*; Special Investigations Division, Committee on Government Reform, United States House of Representatives (May 7, 2003). Specifically, the report found:

Over 90% of the nursing homes in the district violated federal health standards during recent state inspections. Moreover, almost one-third of the nursing homes had violations that caused actual harm to residents or placed them at risk of death or serious injury.

See *Executive Summary*, May 7, 2003, report.

This report relied on inspection results from federal and state agencies in reaching the conclusion that the nursing homes in the Second Congressional District fall substantially below federal standards. “Many residents are not receiving the care that their families expect and that federal law requires.” *Id.* at Section III.

Additionally, another report issued by the General Accounting Office shows that “state survey data indicates that the proportion of nursing homes with serious quality problems remains unacceptably high ..” General Accounting Office - Report to Congressional Requesters, *Nursing Home Quality - Prevalence of Serious Problems, While Declining, Reinforces Importance of Enhanced Oversight*. (July, 2003).

Defendants argue that the surveys are irrelevant because they are unrelated to the specific allegations of Plaintiff. However, the deficiencies cited in the survey documents are precisely the types of negligent acts forming the basis of Plaintiffs claims. State surveys over the past few years not only show the vast number of problems present at Greenwood Health & Rehabilitation, but also conclusively indicate that Defendants were on notice of many of the issues present in this case.

For example, Greenwood Health & Rehabilitation was cited during surveys of May 28, 1998, April 28, 1999, May 18, 2000, March 28, 2001, July 26, 2001, September 19, 2001, and August 22, 2002, for numerous problems with resident care that were identical to or substantially the same as the types of problems Mrs. Perry suffered while a resident of Greenwood Health & Rehabilitation. Such problems included:

- failure to provide activities designed to meet the mental and psychosocial well-being of residents;
- failure to maintain a clean and orderly environment;
- failure to ensure that all residents with a [mental retardation](#) diagnosis received specialized services to the level needed by such residents;
- failure to ensure that residents fed by a naso-gastric tube received the appropriate treatment and services to prevent aspiration, [pneumonia](#), diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers;
- failure to ensure the residents' environment remained as free of accident hazards as possible;
- failure to ensure that foods were prepared, distributed and served under sanitary conditions;
- failure to provide reasonable services to fulfill residents' individual needs by failing to provide ordered services and adapter equipment;
- failure to meet nutritional needs of residents in accordance with the recommended dietary allowances;
- failure to ensure each resident received food prepared in a form designed to meet individual needs;
- failure to ensure adequate supervision and assistance devices to prevent accidents;
- failure to promote care that maintains or enhances residents' dignity; failure to revise care plan;
- failure to provide food prepared by methods that conserve nutritive value, flavor, appearance and is palatable and at proper temperature;

- failure to ensure proper infection control techniques;
- failure to maintain effective pest control program;
- failure to ensure restraint assessments;
- failure to promote proper nail care;
- failure to provide appropriate treatment and services to prevent urinary tract infections; and
- failure to maintain clinical records in accordance with accepted professional practice.

All of these citations put Defendants on notice that they had serious problems with their nursing home and that residents were suffering as a result. The fact that Defendants ignored these problems and were repeatedly cited in survey after survey shows that Defendants made a conscious and deliberate decision to operate Greenwood Health & Rehabilitation in a manner that evidences conscious or reckless disregard for the rights and the health of the residents, including Mrs. Perry.

While the Mississippi Supreme Court has not addressed this issue, numerous courts have expressly held that state nursing home inspection reports are relevant and admissible in civil actions against nursing homes. See *Advocat Inc., et al v. Sauer*, 353 Ark. 29, 111 S.W.3d 346, (2003) *cert. denied* 2003 WL 21801654 (Nov. 10, 2003). See also, *Horizon CMS Healthcare v. Auld*, 985 S.W.2d 216 (Tex. Ct. App. - Fort Worth 1999), *aff'd in part, rev'd on other grounds*, 34 S.W.3d 887 (2000); *Montgomery Health Facility, Inc. v. Ballard*, 565 So. 2d 221 (Ala. 1990); *Flint City Nursing Home, Inc. v. Depreast*, 406 So. 2d 356 (Ala. 1981).

In *Sauer*, *supra*, the appellants contended that the trial court **abused** its discretion by admitting into evidence two redacted Office of Long Term Care surveys concerning the treatment of residents other than Mrs. Sauer. The Arkansas Supreme Court affirmed the trial court stating:

We believe that the surveys completed by the OLTC in January 1997 and May 1998 were relevant to the instant case. The Sauer Estate put on substantial evidence of ways in which Mrs. Sauer suffered while a resident at Rich Mountain, much of which centered on inadequate staff and nursing care available to Mrs. Sauer. Any evidence having a tendency to make these allegations more or less probable would be relevant. Clearly, the OLTC's findings that Rich Mountain was not meeting OLTC's requirements regarding adequate nursing staff were relevant as to whether the Sauer Estate's allegations of lack of patient care were true.

Id. at 59, 111 S.W.3d at 363. (emphasis added).

The court further stated:

Each OLTC survey notified appellants of examples of the manner in which Rich Mountain failed to meet the needs of its patients due to inadequate staffing. Whether the patients at Rich Mountain suffered from inadequate nurse staffing pertaining to personal hygiene, feeding, and treatment would certainly have a bearing on whether the allegations made by the Sauer Estate about the lack of quality care afforded to Mrs. Sauer were more or less probable. Moreover, the surveys are probative of the fact that the appellants were on notice of dangerous conditions in the nursing home due to understaffing. Because the OLTC surveys were relevant, they were admissible unless their probative value was substantially outweighed by the danger of unfair prejudice or they would mislead the jury.

Id. at 60, 111 S.W.3d at 364 (internal citations omitted)(emphasis added).

In *Ballard, supra*, the Alabama Supreme Court expressly held that the evidence contained in survey documents was relevant and admissible:

The defendants argue that the trial court incorrectly admitted into evidence survey and complaint reports regarding the nursing home. These reports, compiled by the Alabama Department of Public Health, contained information about deficiencies found in the nursing home.

The deficiencies admitted into evidence were inadequate documentation of treatment given for [decubitus ulcers](#), 23 patients found with [decubitus ulcers](#), 10 of whom developed those ulcers in the facility; dressings on the sores were not changed as ordered; nursing progress notes did not describe patients' ongoing conditions, particularly with respect to descriptions of [decubitus ulcers](#); worsening of [decubitus ulcers](#); ineffective policies and procedures with respect to sterile dressing supplies; lack of nursing assessments; incomplete patient care plans or progress notes; a.m. care not consistently documented; patients found wet and soiled with dried fecal matter; lack of bowel and [bladder retraining](#) programs; incomplete documentation of ordered forced fluids; inaccessible water pitchers; monthly weighing of patients was not done; incomplete documentation of food consumption; tube feeders were not receiving their feedings as ordered; linen was not handled properly to prevent the spread of infection; vital signs not checked as ordered; inadequate staffing; the director of nursing was not responsible for the standards of nursing practice; charge nurses had not been responsible for the supervision of nursing activities; the governing body in its management through the administrator had not enforced rules and regulations concerning patients' health and safety due to deficiencies noted in nursing services, such as bowel and [bladder training](#), activities of daily living, ambulation, patient care planning, and infection control. There was evidence that all of these deficiencies contributed to the development or worsening of [pressure sores](#).

Because the jury could find that the deficiencies noted were deficiencies that proximately caused Mrs. Stovall's death, this evidence was admissible and the trial judge did not [abuse](#) her discretion in admitting it.

Id. at 223-24.

In *Flint, supra*, also cited by Defendants, the Alabama Supreme Court held that 12 out of 16 deficiencies contained in a nursing home state survey *were admissible* for the purpose of “showing notice to the nursing home of dangerous conditions existing at the nursing home and inadequate policies and procedures relative to the care and well-being of the residents.” *Id.* at 361. Finally, in *Auld, supra*, the Court of Appeals rejected the defendant's argument that nursing home surveys were irrelevant, holding that the surveys were admissible under [Rule 803\(8\) of the Texas Rules of Evidence](#).

Here, the types of violations discovered during the survey process directly affected the well-being of the nursing home's residents, including Mr. Edwards. Despite Defendants' statements to the contrary, there is ample evidence that many of the specified deficiencies had a direct impact on Mr. Edwards' condition, and as such, proximately contributed to his injuries.

The nursing home oversight process has recently been under attack for its inability to stop ongoing [elder abuse](#) and neglect. Testimony on July 27, 1998, before the U.S. Senate Special Committee on Aging documented ongoing and worsening [pressure sore](#) infections and deaths at skilled nursing facilities, yet at the same time state agency survey teams showed either zero or minimal deficiencies in its reports. The Senate testimony was based upon a United States General Accounting Office (GAO) report entitled *Care Problems Persist Despite Federal and State Oversight*. The Committee reported:

[W]e believe that the extent of current serious care problems portrayed in these federal and state data is likely to be *understated*. We found that homes could generally predict when their annual on-site reviews would occur and, if inclined, could take steps to mask problems otherwise observable during normal operations. In addition, we found instances of irregularities in the homes' documentation of the care provided to their residents, such as missing pages of clinical notes needed to explain a resident's injury later identified through

physician observation. These types of irregularities could shield from survey scrutiny such problems as inadequate staffing or avoidable injuries.

If Defendants want to complain about the survey process they have clearly chosen the wrong side of the issue. The survey documents contain factual findings regarding actual residents of the nursing home. The manner in which the surveyors chose their resident sample does not change those facts. In addition, their argument that the results are unreliable is relevant to the *weight* of the proffered evidence, not its admissibility.

Plaintiff should be allowed to introduce the surveys to prove recurring poor conditions in the facility, knowledge by Defendants of prior instances of **abuse** and neglect, and Defendants' failure to address these conditions. Defendants cite [Rule 404 of the Mississippi Rules of Evidence](#), claiming the surveys are inadmissible character evidence. However, [Rule 404](#) has an important exception:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[Miss. R. Evid. 404\(b\)](#) (emphasis added).

The information contained in the surveys goes to the knowledge of Defendants of the prevalence of the substandard conditions at Greenwood Health & Rehabilitation. In *Horizon/CMS Healthcare v. Auld*, *supra*, the Court of Appeals of Texas addressed this very issue with regard to the admissibility of surveys:

Moreover, evidence of a defendant's subjective knowledge of the peril his conduct creates is admissible to prove gross negligence, which was an issue at this trial. The information contained in [the surveys] confirms the nursing home's knowledge of the conditions in the home that adversely affected [the resident's] care and showed that the state did bring those conditions to the home's knowledge in a timely manner with regard to [the resident's] stay at the home.

Id. at 227.

In *Mitchell v. State*, 491 So.2d 596 (Fla. 1st Dist. Ct. App. 1986), the Florida Court of Appeals held that evidence relating to the general conditions of a nursing home facility, including roach infestation, failure to follow dietary menus and nutritional guides, inadequate staffing and training, and specific references to poor care of other residences of the facility, was admissible:

We are of the view that the evidence in the category was admissible to show knowledge and absence of mistake on the part of Mitchell. The defense pointed to testimony that **bedsores** can occasionally develop in a properly supervised facility. *Evidence of the prevalence of the conditions and improper treatment throughout the [facility] was relevant to counter an inference that the conditions giving rise to the named victim's injuries were isolated instances beyond the defendant's knowledge and control.*

Id. at 599 (emphasis added).

In this case, Plaintiff should be allowed to provide evidence that the failures on the part of Defendants were not simple mistakes, and that Defendants knew of the conditions existing on the premises at the time of Mr. Perry's residency because they had been specifically told by the State of Mississippi that the care they were providing was substandard and could cause harm to their residents.

It is well settled in Mississippi that a violation of a statute or regulation is evidence of negligence. The standards of care and specific regulatory requirements for nursing homes are codified at 42 C.F.R. Part 483. Plaintiff maintains that Defendants clearly failed to provide Mr. Perry with that level of care necessary for her to reach her highest level of mental, physical and psychosocial well-being. Thus, evidence of Defendants' failure to meet statutory and regulatory minimum standards of care is plainly relevant to the question of negligence. *Moore v. Memorial Hosp. of Gulfport*, 825 So. 2d 658 (Miss. 2002) plainly states that while a violation of the State Board of Pharmacy's internal regulations does not create a separate cause of action, the violation of the regulation may serve as evidence of negligence. In certain cases, a breach of a statute or ordinance renders the offender liable in tort without proof of a lack of due care-this is negligence *per se*. See *Palmer v. Anderson Infirmary Benevolent Association*, 656 So. 2d 790 (Miss. 1995). Furthermore, violation of statutes and regulations will particularly support a cause of action for negligence where, as here, the individual harmed was supposed to be protected by the statutes and regulations that were violated. *Haver v. Hinson*, 385 So. 2d 605 (Miss. 1980); see also *Hartwell Handle Co. v. Jack*, 115 So. 586 (Miss. 1928) (holding that violation of a criminal statute gives rise to civil liability).

In *Hill v. Beverly Enterprises-Mississippi, Inc., et al*, Civil Action No. 3:03CV301LN, (S.D. Miss. Oct. 31, 2003) Judge Lee addressed the defendants' argument that regulations in Mississippi cannot be used to create a legal duty of care for purposes of civil litigation. Judge Lee specifically found that the defendants in that case misread *Moore v. Memorial Hosp. of Gulfport*, 825 So. 2d 658 (Miss. 2002), also relied upon by Defendants here. In addressing this argument, the Court noted as follows: The Mississippi Supreme Court has never held, and did not hold in *Moore*, that statutes or regulations *cannot* establish a legal duty or standard of care or cannot serve as evidence of negligence. Rather, the court in *Moore* held only that the particular regulations under consideration there, namely the State Pharmacy Board's internal regulations governing the conduct of pharmacies within the State, did not "create a separate cause of action" or "establish a legal duty of care to be applied in a civil action." The court's conclusion in *Moore* that those regulations did not establish a legal duty of care was not based on the fact that they were *regulations*, but rather on the fact that the *substance* of those specific regulations was not such as to impose a legal duty on the part of pharmacists. Moreover, the court specifically recognized that "[a] violation of one of [the Pharmacy Board's] internal regulations...may serve as evidence of negligence." Thus, it is hardly the case, as defendants appear to contend, that regulations cannot establish a standard of care.

Id. (emphasis the Court's)(copy attached).

Further, in *Wilkins v. Bloodsaw*, 850 So. 2d 185, 2003 WL 21649679 (Miss. Ct. App. July 15, 2003), the Mississippi Court of Appeals reviewed the trial court's grant of summary judgment in favor of the owner and manager of a restaurant after injuries sustained by the plaintiffs in a fall. The trial court refused to consider an affidavit from the plaintiffs' expert stating that the restaurant had a duty to maintain the premises in accordance with federal law as well as various safety standards. However, the Court of Appeals concluded that "the expert's affidavit provided evidence to establish the question of negligence as a genuine issue of material fact." In reaching this conclusion, the Court noted that the plaintiffs provided case law "that states that safety standards and regulations are admissible as a measure to show reasonable care consistent with industry standards."

For the aforementioned reasons, the surveys are admissible.

16. COMPLAINTS, LAWSUITS, CLAIMS OR PROBLEMS THAT DO NOT REFERENCE CARE RENDERED TO VADER PERRY

Plaintiff has fully responded to this issue in sections 1, 2 and 15 above. For the reasons set forth in those sections, Defendants' motion should be denied.

17. REQUEST/ATTEMPT TO SECURE DOCUMENT, SPTIPULATION OR OTHER AGREEMENT FROM ANY WITNESS, DEFENDANT OR DEFENSE COUNSEL IN THE PRESENCE OF THE JURY.

This request is nothing more than an attempt by Defendants to improperly limit the types of questions Plaintiffs counsel can ask. Plaintiff has the right to ask any witness whether they agree or disagree with a proposition provided the proper predicate is laid. As such, Defendants' motion should be denied.

18. REFERENCE TO STATE OR FEDERAL REGULATIONS

Plaintiff has addressed this issue in her Response to Defendants' Motion In Limine to Exclude Certain Statutes and Regulations as Standard of Care and incorporates said response herein. As for usurping the jury's role as arbiter of the reasonable care standard, Plaintiff bears the burden of establishing a breach of the requisite standard of care and intends to illustrate how Defendants breached their duty by violating various standards set forth in State or Federal regulations. Such action does not come close to usurping the jury's role as fact finder. Thus, Defendants' motion should be denied.

19. IMPACT OF THIS TRIAL ON THE QUALITY OR NATURE OF HEALTH CARE

Plaintiff does not intend to make references to the impact this trial or a verdict has upon the quality or nature of health care or its availability to the community at large other than to inform the jury that such thoughts should not enter their mind when addressing the merits of this case. With that said, Defendants and defense counsel should similarly be restrained from making comments or references as to how this case could impact health care as a means of scaring the jury.

20. USING THE VERDICT AS A MECHANISM FOR SOCIAL CHANGE

Plaintiff intends to utilize all appropriate arguments during the various phases of this trial. One of the phases could involve punitive damages. As defense counsel is aware, "The purpose of a punitive damage award is not to compensate the Plaintiff for actual damages, but rather to punish and deter the defendant from further behavior, to deter similar behavior by other potential defendants, and to compensate the plaintiff for her public service in holding the [defendant] accountable." *American Income Life Ins. Co. v. Hollins*, 830 So.2d 1230, 1243 (Miss. 2002). It is with this principle in mind that Plaintiff is permitted to argue that this verdict can be a mechanism for social change.

21. REFERENCE TO "REPORT TO CONGRESS, APPROPRIATENESS OF MINIMUM NURSING STAFFING RATINGS IN NURSING HOMES"

One of Plaintiff's allegations is that Grenada Health & Rehabilitation was chronically understaffed and that the understaffing directly led to the injuries Vader Perry suffered. Information which tends to demonstrate the validity of this theory is relevant and probative. With that said, Plaintiffs counsel is fully aware of the need to lay a proper predicate for the admission of any reports regarding the impact of staffing upon resident care and will fulfill those requirements before seeking to have any report admitted into evidence.

22. USING J.D. LEE'S DEPOSITION

As Defendants have not indicated with any specificity which portions of Mr. Lee's testimony are objectionable, Plaintiff is not able to address the merits of Defendants' motion. Furthermore, if the motion relates solely to the relevancy of Mr. Lee's testimony, the motion is premature and should not be addressed until such time as it becomes ripe.

23. USE OF ROY DUMAS' DEPOSITION

As Defendants have not indicated with any specificity which portions of Mr. Dumas' testimony are objectionable, Plaintiff is not able to address the merits of Defendants' motion. Furthermore, if the motion relates solely to the relevancy of Mr. Dumas' testimony, the motion is premature and should not be addressed until such time as it becomes ripe.

24. DEFENDANTS' CORPORATE STRUCTURE

Plaintiff addressed this issue in section 13 above and incorporates that response herein.

25. NEGLIGENCE OR GROSS NEGLIGENCE NOT RELATED TO VADER PERRY'S CARE

Defendants seek to keep out any evidence of negligence or gross negligence that does not specifically reference care Vader Perry received.

Among the negligent acts ascribed to Defendants and asserted in Plaintiffs Complaint are: the failure to provide adequate care and supervision; the failure to meet Mrs. Perry's needs; the failure to adequately monitor, assess and care for Mrs. Perry; and the failure to provide sufficient staff. Information already obtained in this action clearly reveals that Grenada Health & Rehabilitation was understaffed, lacked adequate supplies, and could not provide even the most basic care to Mrs. Perry and the other residents.

While there are no Mississippi cases directly on point, other jurisdictions have found the type of information at issue admissible at trial. In *Beverly Enterprises - Florida, Inc. v. Spilman*, 661 So.2d 867 (Fla. Dist. Ct. App. 1995), the court held that the following information was relevant to issues surrounding the extent of the defendants' negligence. Some of the evidence in *Spilman* showed:

1. Spilman lost an excessive amount of weight, became increasingly confused and agitated, and became non-ambulatory.
2. He was seen restrained in a geri-chair (in a vest with ropes which tied in the back) almost everyday for hours at a time.
3. If the nursing home was understaffed, he was often left sitting in soiled clothing, and on a number of occasions he attempted to untie his restraints to escape his chair. When he was unsuccessful, he dragged the chair around with him.
4. He was supposed to receive help eating, but if the nursing home was understaffed, he received no help and his tray was thrown away. At times his chart was documented to show that he was fed when he was not.
5. When a stomach tube was placed in his stomach in order to provide him with nourishment, on many occasions nurses did not properly refill it for hours at a time. An employee who worked on Spilman's wing of the nursing home during the day shift testified that when the stomach tube was in place, he was supposed to receive 30-minute feedings, two times per shift. When she was rushed, however, she had to do the feeding in five to eight minutes. She stated that the tube site looked "nasty" and was draining and that Spilman suffered from deep draining [pressure sores](#). His bandages were supposed to be changed and initialed on every shift. Sometimes the bandages were changed from day-to-day; other times they were not.
6. Spilman had deep [bedsores](#) on his hips and buttocks and the odor was strong outside his room.
7. Each wing of the nursing home contained sixty patients to be cared for by one charge nurse, one regular nurse and three certified nursing assistants.
8. A certified nursing assistant was also required to perform a nurse's job.

9. The head nurse was unavailable for hours at a time.

10. The nursing staff knew when the state would come to inspect and on those occasions increased staff.

11. The nursing home was understaffed.

12. A treating physician testified that Spilman suffered from one of the worst cases of [bedsores](#) he had ever seen. The physician stated that he “couldn't believe it” when he first examined Spilman. He discovered that the tissue in Spilman's hips was rotted well into both hip joints, surrounding muscles, tendons and ligaments. His post-operative diagnosis was [osteomyelitis](#), a bone infection, which was indicated by bone coated in fluid. The periosteum rotted away from the bone, and the bone was gray and non-viable. When he saw Spilman in the hospital, his injuries were beyond repair.

Id. at 870-71.

The conditions present at Grenada Health & Rehabilitation were part of an ongoing, continuous and routine pattern of neglect on the part of Defendants. Plaintiff will present direct evidence that proves Mrs. Perry's injuries were caused by Defendants' failure to fulfill their duties to her. Plaintiff believes that many of the employees of Grenada Health & Rehabilitation tried to provide adequate care to Mrs. Perry - Plaintiff alleges that the employees were prevented from providing adequate care as a direct result of Defendants' failure to provide adequate staff and supplies.

The testimony Defendants seek to exclude is relevant and probative as it provides a causal link between Defendants' tortious acts and the injuries suffered by Mrs. Perry. Plaintiff should be allowed to show that the substandard care received by Mrs. Perry was not an isolated incident. The testimony is admissible to show Defendants knew or should have known of the deplorable conditions existing in the facility, yet they did nothing. This evidence is relevant, not only to Plaintiffs negligence claim, but also her claim for punitive damages. See *also*, Section 1, *infra*.

26. USE OF AUDIO OR VIDEO MEDIA WHICH DO NOT REFERENCE THE CARE PROVIDED TO VADER PERRY

Plaintiff is unsure what Defendants mean regarding this specific motion. If the motion is aimed at preventing Plaintiff from using any audio, visual or other means of presenting her case to the jury, such a motion is inappropriate. Otherwise, because of Defendants failure to set forth with any type of specificity the subject of this motion, Plaintiff asks that Defendants' motion be denied.

27. EMPLOYEE COMPENSATION

One of the central issues in this case involves the adequacy of staffing at Grenada Health & Rehabilitation. During the course of discovery it has become evident that the lack of adequate compensation played a role in the shortness of staffing. Towards that end, Defendants failure to offer a competitive wage is relevant to these proceedings. Further, the salaries and bonuses paid to management is relevant as it directly impacts Plaintiff's theory of profits over people. Thus, Defendants' motion should be denied.

28. DEFENDANTS' FINANCIAL INFORMATION

Plaintiff has alleged that Defendants' negligence caused harm to Vader Perry. The elements of a negligence claim are duty, breach, causation and damages. Defendants had a duty to provide adequate resources to Grenada Health & Rehabilitation so

that the needs of all residents could be met. Plaintiff contends that Defendants breached their duty by failing to provide enough staff and supplies and that this failure caused Mrs. Perry's injuries. Defendants' motion seeks to exclude evidence necessary to proving these elements.

While Plaintiff does not intend to use net worth evidence in the liability phase, Defendants' *financial status* is relevant to Plaintiff's claims. Defendants' Motion claims that Plaintiff should be prohibited from introducing evidence about Defendants' net worth, revenues, profits or losses as well as trying to demonstrate that the Defendants acted with actual malice, gross negligence or willful, wanton or reckless disregard for the safety of Vader Perry. While Plaintiff agrees that information concerning net worth is not proper until the Court determines that the issue of punitive damages is ripe for submission to the jury; Plaintiff disagrees that reference to revenues, profits or losses is improper.

Plaintiff contends that Defendants were negligent in the manner in which they allocated resources to Grenada Health & Rehabilitation, specifically putting profits before resident care. Evidence of Defendants' budgeting process is relevant to Plaintiff's contention that the management of Grenada Health & Rehabilitation intentionally limited expenditures so that residents, like Mrs. Perry, did not receive adequate care. Plaintiff will present evidence from Grenada Health & Rehabilitation employees as to the effects corporate budgeting had on the facility's residents, including Mrs. Perry. Defendants were responsible for Grenada Health & Rehabilitation's budget. By controlling the budget, Defendants controlled the number of staff at the nursing home, as well as the amount of supplies available. Defendants had final budgetary approval for the facilities they owned and operated, meaning they had ultimate control as to the levels of staffing available for these facilities.

If for instance, in response to testimony that the Defendants failed to supply sufficient staffing and supplies to the facility, the Defendants claim that they tried, but were unsuccessful, or did not have the financial resources to do so, then their financial status becomes relevant to Plaintiff's claim for compensatory damages. Evidence such as budget and cost reports will show how much money the nursing home spent providing staff and supplies to care for its residents and whether Defendants increased, decreased, or even considered altering the facility's budget for staffing and supplies, in light of the repeated warnings the nursing home received in these areas. Thus, certain financial information is relevant and admissible separate from the question of current net worth. Also, Defendants are required to ensure the financial plan is sufficient to meet resident needs. See Dept. of Health Rules, Regulation and Minimum Standards for Institutions of the Aged or Infirm § 404.2.

Further, Defendants' Motion is premature at best, as the appropriate time for any motion regarding punitive damages is after Plaintiff has presented her case at trial. Only at this time will this Court be able to determine whether Plaintiff has presented sufficient evidence for the issue of punitive damages to be presented to the jury.

29. EVIDENCE REGARDING THE IDENTITY OF OFFICERS/DIRECTORS

Defendants' motion is yet another example of wanting to try this case without the jury being provided all of the necessary information. The identity of the persons responsible for establishing the policies and procedures could become relevant, especially during voir dire. Further, Plaintiff has no intention of making disparaging comments regarding any individual. As such, Defendants' motion should be denied.

30. BANKRUPTCY DISCHARGE

Plaintiff has no intention of mention the impact Defendants' bankruptcy has upon any claims. In fact, Plaintiff has filed her own motion regarding prohibiting reference to the fact that Defendants even filed bankruptcy. As such, this is not an issue.

31. INSURANCE

Plaintiff agrees that information regarding insurance coverage of the Defendants should be excluded and does not intend to attempt to introduce any such evidence of the information as contemplated by [Rule 26\(b\)\(2\) of the Mississippi Rules of Civil Procedure](#) and [Rule 411 of the Mississippi Rules of Evidence](#).

32. PLANS OF CORRECTION

Information related to events or conditions that existed at Grenada Health & Rehabilitation prior to as well as after Vader Perry's residency may be evidence of prior and similar incidents and thus could be relevant to prove foreseeability, notice and appreciation of the danger of providing substandard care. Such evidence is also probative of Defendants' intent or motive with regard to the acts and omissions for which Plaintiff claims damages.

In this case, the evidence at issue indicates that Defendants' actions or inactions were not mistakes but that Defendants knew of the conditions existing on the premises at the time of Vader Perry's residency. In [Criswell v. Best Western International](#), 636 So.2d 562 (Fla. 3d Dist. Ct. App. 1994), the court stated that, in a suit involving negligence, accident reports, preceding and post-dating plaintiff's injury can be used to establish notice of dangerous or defective condition in [a] personal injury suit." *Id.* at 563.

Further, the public policy behind any subsequent remedial measures exclusion of evidence is to encourage a party to voluntarily undertake to fix a problem. To the extent Defendants sought to fix any of the deficiencies or problems at Grenada Health & Rehabilitation, this was required by law so that they would continue to receive Medicaid and Medicare funding. There was nothing voluntary on the part of Defendants in addressing problems and deficiencies at their facility. Therefore, the subsequent remedial actions or subsequent remedial measures exclusion urged by Defendants is inapplicable. In addition, although Defendants may have corrected deficiencies in order to maintain their license, there is no viable evidence that they ever followed these plans of correction. The problems, in other words, were never meaningfully addressed. Such information is relevant and should be admitted at trial. Plaintiff has further addressed this issue in section 16 above.

33. NEWSPAPER ARTICLES

Plaintiff has no intention of introducing any newspaper articles as evidence at trial. However, should any such articles come to light which address problems at Defendants' facilities, that information goes to notice Defendants had of the problems and the facility and to misrepresentations they made concerning their ability to provide care.

34. CHARACTERIZING MISSISSIPPI'S **ELDERLY** AS VULNERABLE

Defendants seek to ignore the statutory mandate handed down by Mississippi's legislature regarding the **elderly**. [Section 43-47-5\(m\) of the Mississippi Code](#) sets forth the definition of a vulnerable adult. Not only do persons like Vader Perry who need assistance with their activities of daily living fall within the definition of a vulnerable adult, but residents of facilities like Grenada Health & Rehabilitation also fall within the scope of the definition. As such, any reference to Mississippi's **elderly** who live in facilities such as Grenada Health & Rehabilitation is permissible.

35. "CARE CRISIS"

Any references to a "care crisis" or "industry crisis" necessarily goes to the notice of knowledge of Defendants that they are providing poor care to their residents. See also section 32 above.

36. POLICIES, PROCEDURES AND PROTOCOLS OF OTHER FACILITIES

Plaintiff does not agree that this evidence should be automatically excluded. To the contrary, these documents can contain relevant information such as the implementation of nursing protocols, revisions of administrative policies, and care issues raised by employees, residents or family members. Defendants' policies and procedures dictate, in part, the day-to-day treatment of residents, including Mrs. Perry, and the overall operation of Grenada Health & Rehabilitation. Plaintiff contends that this information also provides evidence of Defendants' notice of problems at all their facilities and whether any policies and/or procedures were implemented in response to these problems and is thus relevant to the jury's determination as to whether punitive damages are warranted. *See also*, Section 13, *supra*.

37. PROFITS OVER PEOPLE

Defendants are yet again trying to dictate to Plaintiff the appropriate theory for trying the case. Such a tactic is improper. Regarding the relevancy of such a theory, please see section 28 above.

38. SETTLEMENT NEGOTIATIONS

Plaintiff agrees that information regarding settlement negotiations with Defendants should be excluded and does not intend to attempt to introduce any such evidence.

39. CHURCH AFFILIATION

Defendants move to prevent Plaintiff and any witness from testifying about any church affiliation. Plaintiff has a right to put a human face on Vader Perry and explain to the jury what her life was like prior to the substandard care she received at Grenada Health & Rehabilitation. Towards that end, Plaintiff has the right to explain to the jury, through witnesses, the activities Vader Perry enjoyed, including the church she attended. Much like a party can introduce photographs of a person during high school or their wedding when involved in a wrongful death suit, Plaintiff should be allowed to make a reference to the fact that Mrs. Perry attended a certain church. *See Eckman v. Moore, ...So.2d ..., 2003 WL 22411078 (Miss. 2003)*. Thus, Defendants' motion is without merit.

40. USE OF FAMILY MEMBERS AS PROPS

Defendants' desire to dehumanize this trial should not be tolerated. Mrs. Perry's family has brought legitimate claims pursuant to Mississippi law. As such, Vader Perry's family members have a right to be present at the trial. Further, the jury has a right to know about the impact losing Vader Perry has upon her family. As such, Defendants' motion should be dismissed.

41. INAPPROPRIATE PHARSES

Defendants have moved to exclude all improper statements which describe the care that Vader Perry received. Plaintiffs counsel has no intention of doing anything improper at any stage of the trial and assumes that defense counsel also will not engage in improper conduct during trial. Defendants' Motion in this regard is an attempt to "muzzle" counsel for the Plaintiff by accusing them - without basis - of attempting something improper at a point well into the future. Defendants' desire is to prevent Plaintiffs counsel from adequately representing their client by giving a proper description of the care Mrs. Perry received. As such, Defendants' motion should be denied.

42. "GAG" ORDER

Plaintiff can understand Defendants' desire to not taint the jury during the trial of this matter by having excluded information passed along via the media. However, Defendants' motion covers much more ground than that. While Plaintiff agrees to limit

contacts with the press, Plaintiff does reserve the right to discuss what occurs during the trial with expert witnesses in order to properly prepare them along with discussing the case among the trial team. Further, once the jury reaches its verdict and said verdict is published in the courtroom, the basis for Defendants' motion no longer exists. As such, Plaintiff reserves the right to discuss the case with the press at the appropriate time and in the appropriate manner should that be warranted. Defendants' repeated attempts to muzzle counsel and prevent the truth about their operations from seeing the light of day should be seen for what they are and the motion denied.

CONCLUSION

As stated previously, Plaintiff is aware of and intends to comply with all applicable rules of evidence and procedure. Plaintiff assures the Court that the necessary foundation will be laid prior to witness testimony and assumes that Defendants will do the same. As such, Defendants' Motion is premature and should be denied.

Respectfully submitted,

The Estate of Vader I. Perry by and through Betty Rayburn, Administratrix of the Estate of Vader I. Perry, for the use and benefit of the Estate of Vader I. Perry, and for the use and benefit of the wrongful death beneficiaries of Vader I. Perry,

WILKES & MCHUGH, P.A.

<<signature>>

Richard E. Circeo, Esq.

Mississippi Bar No. 9949

Christine C. Althoff

Mississippi Bar No. 101077

W. Todd Ver Weire

Mississippi Bar No. 101021

Brian Thompson

Mississippi Bar No. 101102

16 Office Park Drive, Ste. 8

Hattiesburg, MS 39402

Mailing Address:

P. O. Box 17107

Hattiesburg, MS 39404

Telephone: 601-545-7363

Facsimile: 601-545-7364

Attorney for Plaintiff

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